82-1552

NO.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK W. GRIGSBY,

Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES VOLUME III—APPENDICES "L-R"

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WOODWARD, HILLYER,
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APPENDIX "L"

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY and JAMES EDWARDS, Secretary of Energy,
Defendants-Appellees,

and

THE UNITED STATES OF AMERICA,
Counterclaimant-appellee.

Before BROWN, HEMPHILL and POINTER, Judges.

ORDER

Upon consideration of Appellant's petition for rehearing, It is

ORDERED that said petition for rehearing is Denied. The mandate will issue March 1, 1983.

FOR THE COURT:

DONNA M. BOLD, Clerk

By: Patricia L. Krosel
Patricia L. Krosel
Chief Deputy Clerk

February 22, 1983

APPENDIX "M"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS

OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,

Appellant

versus

DEPARTMENT OF ENERGY,
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING

COMES NOW Jack W. Grigsby ("Grigsby"), appellant, and petitions the Court for a rehearing of the decision of the Court contained in its Opinion issued January 18, 1983, and, in support of such petition, shows:

1. The decision of this Court, it is respectfully submitted, is in direct conflict with the decision of the Supreme Court of the United States in *Burlington Truck Lines v. United States*, 371 U.S. 156. 168-169 (1962) ("...The courts may not accept appellate counsel's post hoc

rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself ..."). See also: *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 631, n. 31 (1980). It is also in conflict with decisions to the same effect by other Courts of Appeals, notably the Fifth Circuit. *Real v. Simon*, 514 F.2d 738, 739 (CA 5 1975); *Pennzoil v. FPC*, 534 F.2d 627, 631 (CA 5 1976); *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F.2d 1255, 1259-60 (CA 5 1981).

This conflict results from the fact that this Court's decision affirms the District Court which, in turn, had affirmed the agency order *on grounds never articulated in the agency order under review.* Thus, the District Court was acting directly contrary to the Supreme Court's ruling in *Burlington Truck Lines.* The fact that this Court in *Grigsby I* had so instructed the District Court does not make the clear error of the District Court any less real; it only makes apparent the clear error of *Grigsby I* in instructing the District Court to decide the case on grounds not articulated by the agency.

The Opinion does not disclose the reason for the Court's apparent disregard of *Chenery, Burlington Truck Lines* and their progeny.

2. The Opinion herein appears to rest primarily on its last two grammatical paragraphs (slip opinion, pp. 2-3) which state that Grigsby had been unable to establish at the trial that production from the Robert Leger Well No. 1

had been "treated" as production from a separate property prior to the issuance of Louisiana Office of Conservation Order No. 464-K; this because DOE was "entitled to rely on earlier unit classifications by the regulatory state." Not only does this supply grounds for the agency order never articulated in the order, but it is a fact that prior to completion of the administrative process, the agency had in its possession Order No. 464-K and had all the information showing that the production from the Robert Leger No. 1 Well was production from a different property *so that the agency, in its final order, could not properly have relied on the earlier LOC orders* (see Decision on Appeal, R. 23, 28). Grigsby was correct, *in hindsight,* at the time of his "treatment" of Robert Leger well production as "new oil" by so certifying; he was equally correct, *in hindsight,* at the time of the agency's final order. So the agency's final order may not stand, supported, as it is, only by grounds never stated by the agency but suggested by the *post hoc* argument of appellate counsel, and articulated for the first time on rehearing in *Grigsby I.*

3. The decision of this Court, it is respectfully submitted, is in error in considering *Grigsby I* to be in any way binding upon this Court in *Grigsby II. Grigsby I* was clearly erroneous in instructing the District Court to decide the remanded case on grounds never articulated by the agency's order under review. *Burlington Truck Lines, supra.* When an original decision is clearly erroneous, the law of the case may be modified. *Major v. Benton,* 647 F.2d 110, 112 (CA 10 1981). Further, DOE was precluded on remand from claiming that the instructions of *Grigsby I* were binding on this Court by assurances to the Supreme Court of the United States that the *Grigsby I* instructions were interlocutory only, and not binding. *Cf. Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 512-513 (CA 3 1953); *Jett*

v. Zink, 474 F.2d 149, 155 (CA 5 1973).

(CONCLUSION)

4. Given the fact that, on the face of the record, the instructions of *Grigsby I* bear no resemblance to the grounds relied upon by the agency order under review, it is respectfully submitted that this Court's decision in *Grigsby II* is, on its face, in conflict with the settled jurisprudence of the Supreme Court of the United States and is thus clearly erroneous. A rehearing should be granted.

WHEREFORE, Jack W. Grigsby, appellant, prays as follows:

a. That a rehearing be granted herein;

b. That this Court's decision of January 18, 1983, be vacated;

c. That the Opinion dated January 18, 1983, be withdrawn;

d. That there be judgment reversing the judgment of the District Court and reversing and vacating the Remedial Order and ordering the dismissal of the agency proceedings; or, alternatively, reversing the judgment of the District Court and remanding the case for further proceedings.

All of which is respectfully submitted.

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APPELLANT

APPENDIX "N"

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY, PLAINTIFF-APPELLANT,

vs.

DEPARTMENT OF ENERGY and JAMES EDWARDS,
Secretary of Energy, DEFENDANTS-APPELLEES,

and

THE UNITED STATES OF AMERICA,
COUNTERCLAIMANT-APPELLEE.

On Appeal From The United States District Court
Western District of Louisiana
(Civil Action No. 770258-S)

Argued: January 7, 1983 Decided: January 18, 1983

H. H. HILLYER, JR., with whom J. Henry Phillips III of the same firm, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, Louisiana; and Marlin Risinger, Jr. and W. Michael Adams, of the firm, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, of counsel, were on the brief for the Appellant.

BARBARA WARD, Department of Justice, Washington, D.C., with whom J. Paul McGrath, Assistant Attorney General, and Dennis G. Linder of the same agency; and Daniel F. Shea and Larry Ellsworth, of Counsel, Department of Energy, Washington, D.C., were on the brief for

the Appellees.

Before BROWN, HEMPHILL and POINTER, Judges.

PER CURIAM:

This case has been before this Court on appeal once before in *Grigsby v. Doe*, 585 F.2d 1069, opinion on rehearing at 585 F.2d 1080 (TECA 1978), which will be referred hereafter as *Grigsby I*. The salient facts are stated there and need not be repeated. On rehearing, this Court held that the production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) of the Upper Heywood "A" Sand, Reservoir A, Sand Unit B (Upper Heywood), as a unit separate from the Heywood Sand, Reservoir A, Sand Unit B (Heywood), brought it within DOE's then definition of "separate property." However, the matter was remanded to the trial court for trial on a disputed material factual issue. That issue was whether the Upper Heywood A reservoir had been treated as part of the same unit which covered the Heywood reservoir prior to June 24, 1976, or whether it had been treated as a separate unit before that date. On remand, appellant was unable to carry his burden to show separate unit treatment of the Upper Heywood Reservoir A, as found by the district ccourt. Consequently, the Robert Leger Well No. 1 production before June 24, 1976 should have been priced as "old" oil by appellant.

A close examination of this appeal reveals that appellant does not seek review of any error made by the district court except insofar as the district court complied with this Court's directions on remand. Appellant actually

seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of this case, and were properly followed by the district court.

More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

Grigsby I provided appellant with an opportunity, albeit limited, to establish that the Robert Leger Well No. 1 had been treated as a separate property prior to the state's reclassification, but appellant was unable to do this on remand.

For the foregoing reasons, the decision appealed from is AFFIRMED.

APPENDIX "O"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,
Appellant

versus

DEPARTMENT OF ENERGY,
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,
Appellees

REPLY BRIEF OF JACK W. GRIGSBY, APPELLANT

MAY IT PLEASE THE COURT:

The "Brief of the Federal Government, Appellees" (for convenience, "DOE"), responding to the original brief of Jack W. Grigsby, Appellant ("Grigsby"), has now been filed. In reply to DOE, Grigsby will deal with the points made by DOE in reverse order.

1. DOE'S REPRESENTATION TO THE SUPREME COURT PRECLUDED IT FROM ASSERTING THAT THE GRIGSBY INSTRUCTIONS WERE BINDING ON REMAND.

DOE does not deny that its premier argument

against certiorari (quoted at DOE Brief, p. 14) was exactly as stated by Grigsby (Grigsby Brief, p. 21); that is, that this representation "was a clear reassurance to the Supreme Court that the instructions were neither 'final' nor binding on the District Court." Nor does it question the law announced in the authorities cited by Grigsby (Grigsby Brief, pp. 21-22), typified by *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 512-513 (CA 3 1953). Instead, the defendants' position is that, granting the meaning and effect of the premier representation, other representations were made on which the Supreme Court *might* have relied.

This begs the question. Having made the representation and succeeded in averting issuance of the writ, DOE was then precluded from denying the verity of the representation. The fact that DOE may have had its fingers crossed (figuratively) when it made its original representation, does not excuse it from the *Scarano* rule. Given the Supreme Court's known aversion to issuing certiorari respecting interlocutory orders, it was unnecessary for that Court to read beyond the quoted, and first, representation of the Solicitor General's Brief in Opposition.

The result of the foregoing is that the District Court was not, as a matter of law, bound to follow the *Grigsby*[1] instructions, but was free to decide, in the words of the Solicitor General, that "... under Louisiana law and FEA regulations, the Leger well always was producing from a new 'property' and thus rule in favor of [Grigsby]...." But the District Court adopted DOE's argument that it *was* so

[1] *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), sometimes herein referred to as "*Grigsby-I.*"

bound. In so doing, the District Court's decision was clearly erroneous.

2. THIS COURT'S INSTRUCTIONS IN *GRIGSBY I* REQUIRED THE LOWER COURT TO AFFIRM THE AGENCY'S ORDER ON GROUNDS NOT ARTICULATED BY THE AGENCY AND WERE, THEREFORE, CLEARLY ERRONEOUS.

Again, DOE's argument (DOE Brief, pp. 12-13) appears to concede (as it must) that the grounds upon which *Grigsby-I* required the District Court to decide the "property" issue were grounds not articulated in the agency order under review. Indeed, none of the grounds specified in this Court's instructions were even mentioned in the agency's order, much less made the basis of any finding; all had their genesis in appellate counsel's argument.[2] As stated in *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962):

> "... The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> '[A] simple but fundamental rule of administrative law ... is ... that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is*

[2] See "Responsive Brief of the Government on Rehearing" in Docket No. 5-28, pp. 10-13, 17-20.

powerless to affirm the administrative action ...' "
(Emphasis added.)

Doe's argument is that the rule should not apply here because the agency, if the matter were remanded to it, would reach the same result on the basis of the findings required by the instructions in *Grigsby-I.* "The short answer to this attempted justification is that the [agency] did not so find." *Burlington, supra,* 317 U.S. at p. 168.

* * *

In June 24, 1976, Order No. 464-K issued creating the Upper Heywood "A" RA SUB, with the Leger well as its unit well. The order was *not* "retroactive," and Grigsby has *not* so argued. But the order established, as a fact of public record, that the Leger well *did not* produce from the Heywood RA SUB, and, therefore, must have produced from a "property" different from the Heywood RA SUB. This order was in existence and spread upon the public records when the Remedial Order was issued on November 29, 1976. And when the Remedial Order ignored its existence (as it did the change in the agency's own regulations in September, 1976), Grigsby promptly called the circumstance to the agency's attention in his administrative appeal (*cf.* R. 31).

DOE's arguments in *Grigsby-I,* on rehearing, led this Court to place burdens on Grigsby "... so that the DOE may, in enforcing price control regulations, rely upon the treatment of production as well as the official designations made by state regulatory agencies." (*Grigsby-I,* 585 F.2d at p. 1085.) The DOE's arguments to this Court, on which the quoted language was based, ignored the facts and the agency's own regulations.

* * *

Here, the fact was officially recognized by the Louisiana authorities and notice thereof spread upon the public records prior to the Remedial Order. If it was not already known to the agency, it was called to its attention prior to the Decision on Appeal (R. 31). But the agency ignored the fact, being led astray by the "all-reservoir unit" figment.

* * *

APPENDIX "P"

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

NO. 5-81

JACK W. GRIGSBY,
Appellant

versus

DEPARTMENT OF ENERGY
JAMES EDWARDS and
THE UNITED STATES OF AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

BRIEF OF JACK W. GRIGSBY, APPELLANT

MAY IT PLEASE THE COURT:

This is an appeal by Jack W. Grigsby ("Grigsby") from a final judgment rendered by the United States District Court for the Western District of Louisiana, Shreveport Division (Hon. Tom Stagg, District Judge), on June 30, 1982. After this Court's remand order in *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), cert den. 440 U.S. 908, a trial on the merits ensued. The judgment below

affirmed the administrative order under review, *to-wit:* a certain Remedial Order of the Department of Energy ("DOE"; then the Federal Energy Administration), dated November 29, 1976, as modified by a Decision on Appeal dated March 8, 1977. At the request of DOE, the District Court remanded the matter to DOE to reconsider the refund portion of the administrative order as to the destination of the refund amounts, but not otherwise.

The District Court's opinion (R. 457) makes it clear that the Court felt itself bound by this Court's language in *Grigsby* to the effect (a) that "the sole issue...will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B" (585 F.2d at p. 1086), and (b) that "if the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SUB ... then the production should have been classified as 'old oil'." *Id.* Because the District Court considered itself confined by this language, it did not give effect to the evidence adduced at the trial which demonstrated that the Remedial Order was otherwise clearly erroneous.

Grigsby has appealed from this judgment, on the grounds hereinafter specified.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the agency order under review, absent this Court's instructions in *Grigsby*, is clearly erroneous and not based on substantial evidence, since it is established by this record that its major premise was without foundation, in fact or in law.

2. Whether the "tests" established by this Court's instructions in *Grigsby* were not themselves clearly erroneous, since the agency order under review did not articulate any such tests, but they resulted instead from the *post hoc* argument of appellate counsel.

3. Whether DOE is "estopped" to claim the benefit of such instructions (or may be held to have waived such benefit) by its successful representation to the Supreme Court of the United States that *Grigsby* was "interlocutory" and that the District Court was free to conclude that "...the Leger Well always was producing from a new 'property'...."

4. Whether the judgment below was clearly erroneous and must be reversed because it is in turn based on the supposedly binding effect of the *Grigsby* instructions.

* * *

d. The instructions required Grigsby to establish that production had been apportioned under a voluntary pooling agreement, although there had been no contention that any such agreement existed. Nothing in the Remedial Order suggested this as a test of "treatment."

In *Grigsby* this Court reversed the summary judgment granted by the District Court because it was rendered "prematurely and upon clearly erroneous findings" (585 F.2d at p. 1086). The summary judgment was "premature" because genuine issues of material fact existed, and DOE was not entitled to a judgment as a matter of law. Rule 56(c), *F.R.C.P.* Because it was a premature motion, no discovery had occurred and the barebones record made up was sufficient only to demonstrate that summary judgment was not available. When this Court's opinion

went beyond a reversal of the summary judgment and drew upon the *post hoc* arguments of appellate counsel for directions in deciding the case on remand, it did so not only without the benefit of a full record, but, more importantly, without the benefit of any findings on such subjects by the administrative order under review.

The Supreme Court of the United States, as recently as July 2, 1980, has stated:

> "As we have often held, the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626. ('[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained'); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.(2d) 141, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249, 92 S.Ct. 898, 907, 31 L.Ed.2d 170."
>
> *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 631, n. 31 (1980). See also: *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 159 (1962); *Real v. Simon*, 514 F.2d 738, 739 (CA 5 1975); *Pennzoil v. FPC*, 534 F.2d 627, 631 (CA 5 1976); *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F.2d 1255, 1259-60 (CA 5 1981).

Here, the stated grounds of DOE's order was that the Robert Leger Well No. 1 was producing from the same "property" as the Lucky Strike Well No. 1 because the property was the "Heywood RA SUB" (—and this was clearly

erroneous). Nowhere in the Remedial Order (nor in the Decision on Appeal) is there any question raised, or any mention made, of allocation of production, for example, as an appropriate test for determining whether Leger Well production should be deemed production from the Heywood RA SUB or from a separate property. Nor were any of the other tests contained in the instructions utilized.

Thus, if this Court intended the language in *Grigsby* respecting proceedings on remand to be binding upon the District Court, its decision in *Grigsby* was itself clearly erroneous in that respect.

* * *

IV. DOE WAIVED, OR IS ESTOPPED TO CLAIM, THE BENEFIT OF THE INSTRUCTIONS BY REPRESENTING TO THE SUPREME COURT THAT THE INSTRUCTIONS WOULD NOT SO RESTRICT THE TRIAL COURT'S DECISION.

Because Grigsby feared the effect of this Court's opinion on rehearing, Grigsby applied to the United States Supreme Court for a writ of certiorari (R. 49). Grigsby's petition pointed out to the Supreme Court the nature of this Court's instructions as to "treatment" of production from the Robert Leger Well, and then showed that the agency order under review had not articulated any such grounds, and that under the holding of *Burlington Truck Lines, supra,* the instructions were clearly erroneous. It was Grigsby's hope to elicit Supreme Court response as to the restrictive instructions in the manner of *Lawlor v. National Screen Services Corp.*, 352 U.S. 992 (1957), where the Supreme Court reversed and remanded a case so as to free

a District Court of restrictions imposed by a Court of Appeals on a remand.

In order to respond to Grigsby's fears as to the restrictive effect of the "instructions" on remand and to avoid Supreme Court review, the Solicitor General, on behalf of DOE, assured the Court as follows (R. 73):

> "1. *The judgment below is interlocutory.* The District Court *may conclude* that, *under Louisiana law* and *FEA regulations,* the Leger Well *always* was producing from a new 'property' and thus rule in favor of petitioner, thereby obviating any occasion for this Court's review. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.,* 389 U.S. 327 (1967)." (Emphasis added.)[2]

This representation was successful. Certiorari was denied. (440 U.S. 908.)

In the context of a response to the statements of the petition for certiorari, this was a clear reassurance to the Supreme Court that the "instructions" were neither "final" nor binding on the District Court. Such a result was the target of Grigsby's certiorari petition; its thrust was parried by the Solicitor's assurance to the Supreme Court that this Court remained free to decide that "... the Leger Well always was producing from a new 'property' " "under Louisiana law and FEA regulations." The representations binds DOE. *Cf. Jett v. Zink,* 474 F.2d 1491, 155 (CA 5 1973); *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 512-13 (CA 3 1953) (cited by the 5th Circuit in *Jett v. Zink,*

[2] The dictionary meaning of "interlocutory" is "...not final or definitive...." Webster's Third New International Dictionary, p. 731.

supra); *Texas Co. v. Gulf Refining Co.*, 26 F.2d 394, 397 (CCA 5 1928), cert. den. 278 U.S. 625.

* * *

It is respectfully submitted that the instructions contained in *Grigsby* required the District Court to uphold the agency's order on reasons not stated in the order under review, and that such instructions were themselves clearly erroneous, and should not be considered binding upon this Court. It is also submitted that DOE was precluded on remand from claiming the benefit of such instructions by its successful representations to the Supreme Court. In either or both events, the judgment below should be reversed, and DOE's claim against Grigsby respecting production from the Robert Leger Well dismissed.

* * *

APPENDIX "Q"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

JACK W. GRIGSBY

versus CIVIL ACTION NO. 77-0258

DEPARTMENT OF ENERGY, et al

JUDGMENT

For the reasons assigned in the foregoing opinion,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant and counterclaimant, and against the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be remanded to the Department of Energy for review of the refund provision of the Remedial Order, consistend with the opinion issued this date.

DATED AND SIGNED at Shreveport, Louisiana, this 30th day of June, 1982.

/S/TOM STAGG
TOM STAGG
UNITED STATES DISTRICT JUDGE

APPENDIX "R"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
No. 77-0258

JACK W. GRIGSBY

versus

DEPARTMENT OF ENERGY, SECRETARY OF
ENERGY JAMES EDWARDS and
UNITED STATES OF AMERICA

(Filed June 30, 1982)

* * *

TOM STAGG—DISTRICT JUDGE

OPINION

This long-standing controversy is on remand from the Temporary Emergency Court of Appeals ("TECA"). The issue to be decided is narrow and is well-defined in the TECA opinion.[1] After hearing arguments and reviewing the record, this court concludes that that issue must be resolved adversely to the plaintiff.

---

[1] Upon remand, the *sole issue* before the District Court will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B.

Grigsby v. Dept. of Energy, 585 F.2d 1069, 1086 (TECA 1978).

BACKGROUND FACTS

This case involves compliance with federal oil pricing regulations. Mr. Grigsby, the plaintiff, is an independent oil and gas operator. He was the operator of the Lucky Strike Well No. 1, which served as the unit well for the Heywood Sand, Reservoir A, Sand Unit B, located in the North Jennings Field. The Louisiana Commissioner of Conservation had created the unit and designated the unit well on February 20, 1969, by Order No. 464-F-1. The unit area resulted from the pooling of five separate leaseholds.

Initially there was a period of substantial production from the Lucky Strike Well. Later, however, the well began to produce excessive salt water. Grigsby then sought permission from the Louisiana Commissioner of Conservation to drill a "substitute unit well". On July 26, 1974, by virtue of Order No. 464-F-2, Grigsby was given permission to drill a well on a different lease in the unit. The "substitute unit well' was named that Robert Leger Well No. 1. The well was spudded on August 4, 1974, and production began on October 14, 1974. During the same month that production began on the Leger Well, plaintiff terminated crude oil production from the Lucky Strike Well. Beginning on October 14, 1974, Grigsby charged upper tier prices for the crude oil from the Leger Well, based on his understanding that the oil could be considered "new oil" under Federal Energy Administration ("FEA") Regulations.

Seventeen months after production began from the Leger Well, plaintiff notified the Commissioner of Conservation of his intent to request an order recognizing two separate reservoirs in the North Jennings Field.[2] In June

[2] The initial notice to the Conservation Commissioner of intention

of 1976 the Commissioner issued two orders acknowledging the existence of two reservoirs in the North Jennings Field. The reservoirs were designated Heywood Sand, Reservoir A, and the Upper Heywood "A" Sand, Reservoir A. The Leger Well No. 1 became the unit well for the Upper Heywood "A" Sand, Reservoir A, Sand Unit B.

On November 29, 1976, the FEA issued a remedial order to Grigsby citing violations of Cost of Living Council Regulations and FEA Price Regulations. The FEA had determined that Grigsby had overcharged customers by billing them at "new oil" prices instead of "old oil" prices since the date production began on the Leger Well. Grigsby was ordered to reduce prices on production from the Leger Well immediately and to refund past overcharges. On December 11, 1976, Grigsby appealed the immediate order to the FEA's Office of Exceptions and Appeals. That remedial order was essentially upheld. Grigsby then appealed the FEA action to the United States District Court. Summary Judgment was granted in favor of the FEA, upholding its orders. The court also entered partial summary judgment in favor of the FEA on its counterclaim for civil penalties, and Grigsby was ordered to comply with the remedial order.

An appeal by Grigsby to TECA followed. The facts stated above are those found by TECA on rehearing.[3] TECA recognized that, as of June 24, 1976, production

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(Footnote 2 continued)
to apply for a hearing was issued on March 12, 1976. As noted by TECA in its opinion, Grigsby's notice to the Commissioner was given within three weeks after his receipt of the notice of probable violation issued by the FEA Region VI on February 20, 1976.

[3] 585 F.2d 1069, 1080.

from the Leger Well was considered to be from a separate property and, thus, could be properly classified as "new oil". The question, however, was the status of the Leger Well production from its inception on October 14, 1974, until June 24, 1976. TECA declined to give the 1976 order retroactive application because of "[t]he need for certainty and finality in the enforcement of price control regulations." *Grigsby v. Department of Energy*, 585 F.2d 1069, 1085 (TECA 1978). Because neither the record nor the briefs clearly established the status of the well during the questionable time period, TECA remanded the case to this court for consideration of the official status of the well during that twenty-month interval.

The parties disagree completely as to what issues are now before this court. Plaintiff contends that the findings and rationale of the remedial orders are subject to review because they were based on erroneous findings of fact. On rehearing, TECA recognized that this court's original entry of summary judgment was rendered upon clearly erroneous findings. The error occurred when the District Court found that the Division of the Heywood Sand into two reservoirs did not create two new properties and, therefore, the Leger Well produced from the same "property" as the Lucky Strike Well. TECA corrected the error when it recognized that the 1976 order did create two separate properties. As stated previously, however, TECA declined to give the 1976 order retroactive application. It is evident, therefore, that the original erroneous finding does not affect the question of status of the Leger Well from 1974 until 1976.

The Department of Energy ("DOE") contends that this court must confine its decision to the sole issue of the status of the Leger Well during the period in question. The

language used by TECA supports the position taken by DOE. In its conclusion, TECA stated that "[u]pon remand, the *sole issue* before the District Court will be whether the production from the Robert Leger Well No. 1 from October 14, 1974 until June 24, 1976, should be deemed production from the Heywood Sand, Reservoir A, Sand Unit B." *Id.* at 1086 (emphasis added). That language leaves very little room for discussion as to what role this court should now play.

In addition to setting out exactly what issue is to be decided by this court, TECA also suggested guidelines for this court to use in reaching the decision as to the status of the Leger Well. First, it is important to note that the burden is on Grigsby to prove that the Leger Well production was not treated as production from the Heywood Sand, Reservoir A during the period in question. Second, TECA pointed out that this court should direct attention to the fact that the Leger Well was officially designated as the "substitute unit well" for the Heywood Reservoir A, Sand Unit B. Furthermore, TECA stated that an important area of inquiry would be the method used by Grigsby in apportioning the shares of production from the Leger Well. The opinion states that "[i]f the production from the Robert Leger Well No. 1 were apportioned among the lessees who shared an interest in the Heywood RA SUB, in accordance with the [Order No. 464-F-1] pooling order, then the production should have been classified as 'old oil'." *Id.*

The answers given to the questions raised by TECA lead this court to conclude that production from the Leger Well during the period of October 14, 1974 until June 24, 1976, was treated as production from the Heywood Sand, Reservoir A. It is undisputed that the proceeds of production from the Leger Well were apportioned in the same

proportions before and after October 1974 among the same interest owners. In other words, those persons who received royalty payments from the Lucky Strike Well continued to receive payments after that well went to salt water and the Leger Well, as the "substitute unit well", began to produce crude oil. The interest owners received payments in the same proportions as those established under the pooling order for the Lucky Strike Well. Under the mandate of the TECA court, this means that the production should have been classified as "old oil".

In a footnote to its opinion, TECA recognized that if the lessees who shared interests in the Lucky Strike Well were operating under a voluntary pooling agreement, then Grigsby would have to prove that the apportionment of production from the Leger Well was done pursuant to the voluntary pooling agreement rather than the compulsory pooling provision set forth in Order No. 464-F-1. Grigsby has acknowledged that the apportionment of Leger Well proceeds was not done pursuant to a voluntary pooling agreement. (Plaintiff's response to interrogatory no. 3.)

Furthermore, TECA put the burden on Grigsby to reconcile his payment of proceeds to the lessees, even assuming the absence of any pooling agreement for the Leger Well, with the "substitute unit well" designation and his claim that the oil from the Leger Well was "new oil". Grigsby has not met his burden. In deposition, he states that one of the reasons for paying royalties on the Leger Well to the same royalty owners of the Lucky Strike Well was that the Leger Well was drilled "as a replacement well on an established unit." (Grigsby deposition, page 15, lines 14-16.)

Grigsby argues that Ruling 1977-1, 42 Fed.Reg.

3628, 3634 (1977) should apply to this case. That ruling provides as follows:

> It is not uncommon for less than the total premises subject to a right to produce to be unitized or otherwise aggregated with all or portions of premises subject to other rights to produce, to form a single "property" leaving the balance of the premises formally subject to a single right to produce not aggregated with any such rights. The portion of the premises which is not aggregated is appropriately recognized as a property separate and apart from the portion of the premises which has been aggregated with other rights to produce.

His argument, however, ignores the clear language of TECA. TECA stated that Ruling 1977-1 would control "[i]f the Robert Leger Well No. 1 production had been *officially* recognized *at the outset* as production from outside the Heywood Sand, Reservoir A." It is undisputed that it was some 17 months after production began from the Leger Well that official recognition as production from a separate property was given.

For the reasons stated above, this court finds that the plaintiff has failed to meet his burden to prove that production from the Leger Well was not treated as production from the Lucky Strike Well during the period of October 14, 1974 until June 24, 1976. Therefore, judgment is entered in favor of the government.

On July 2, 1981, DOE and the United States moved for remand of this action to DOE for a re-evaluation of its Order of restitution to specific entities. A remand is requested because of the decontrol of oil prices pursuant to

an executive order of President Reagan. Prior to decontrol, DOE controlled the price of oil at every stage of sale and, therefore, could insure that restitution to the first purchaser-refiner would be passed along to the ultimate consumer. DOE alleges that with the advent of decontrol it has no readily available method of insuring that the overcharges are refunded ultimately to the consumer. The agency wants the opportunity to work out a method of restitution.

Grigsby opposes the motion on the basis that if any part of the Remedial Order is to be modified on remand, the Order should be reviewed by the agency *in toto* because it was based on clearly erroneous findings. That argument has been rejected earlier in this opinion. Grigsby also contends that because the purchasers who will benefit from restitution are not parties to this lawsuit this court cannot order modification of an Order that will affect them. He refers to the Economic Stabilization Act of 1970 § 210 (12 U.S.C. § 1904) which affords purchasers a private right of action if overcharges exist. Based on that provision, Grigsby contends that he may be subjected to multiple lawsuits. This court notes that there have been no other lawsuits filed against Grigsby. The purchasers have not been necessary parties to this action up to this time, and there is no reason to make them such now. There is no basis for Grigsby's position that if the Order is modified the rights of purchasers will be affected whereas they are not affected as the Order exists now. Modification of the Order will protect the purchasers.

In support of the motion to remand, the defendants rely on two recent cases wherein similar motions to remand were granted. In *Citronelle-Mobile Gathering, Inc., et al v. James B. Edwards, et al* (TECA, January 21, 1981), TECA

remanded a remedial order to the district court for an order directing the application to the General Accounting Office Procedures Manual. Restitution payments were to be paid to the United States Treasury and held in a "Deposit Fund Account" to be paid out at DOE's direction under General Accounting. In *Sundance Oil Co., et al v. DOE, et al* (U.S. Dist. Ct., Colo., Oct. 29, 1981), the court granted DOE's conditional motion for remand.

This court finds that the motion to remand should be granted, limited to review and modification of the refund provision of the Remedial Order.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 30th day of June, 1982.

/S/TOM STAGG
TOM STAGG
UNITED STATES DISTRICT JUDGE